No. 97-1777

Supreme Court, U.S.
FILED
JUN 1 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

B.C. ROGERS PROCESSORS, INC., B.C. ROGERS POULTRY, INC., CHOCTAW MAID FARMS, INC., FOREST PACKING COMPANY, INC., MARSHALL DURBIN, INC., MARSHALL DURBIN FOOD CORPORATION, MARSHALL DURBIN POULTRY, INC., MARSHAL DURBIN OF TUPELO, INC., AND MOHAWK PACKING COMPANY,

Petitioners,

v.

THE BOC GROUP, INC., LIQUID AIR CORPORATION AND LIQUID CARBONIC INDUSTRIES CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS J. HIGGINS
Counsel of Record
MICHAEL J. ABERNATHY
MARGARET A. MCGREAL
BELL, BOYD & LLOYD
70 West Madison Street, Suite 3300
Chicago, Illinois 60602
(312) 372-1121

WILLIAM G. SCHOPF, JR.
PATRICK J. HENEGHAN
ARTHUR J. HOWE
SCHOPF & WEISS
304 West Randolph Street
Chicago, Illinois 60606
(312) 701-9300

JOHN BURKE
CLAUDIA LOVELETTE
BURKE, WEAVER & PRELL
55 West Monroe Street, Suite 800
Chicago, Illinois 60603
(312) 263-3600

Attorneys for Respondents

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

QUESTION PRESENTED

Whether the Mississippi and California Opt-Out Plaintiffs ("Petitioners") waived their objections to a trial in the United States District Court for the Middle District of Florida by (i) agreeing during pretrial proceedings and in the Final Pretrial Order that this action would be tried in the Middle District of Florida, and (ii) failing to object to venue until the day the trial was scheduled to begin?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are correctly described in the Petition.

TABLE OF CONTENTS

PAGE(S)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT 6

CONCLUSION 9

TABLE OF AUTHORITIES

PAGE(S)

CASES

Leroy v. Great Western United Corp.,
443 U.S. 173 (1979) 7

Lexecon Inc. v. Milberg Wiess Bershad Hynes & Lerach,
__ U.S. __, 118 S. Ct. 956 (1998) ..... *passim*

State of Florida v. Liquid Air,
136 F.3d. 139 (11th Cir. 1998)(*per curiam*) 1

W.A. Stackpole Motor Transp. v. Malden Spin & Dye Co.,
263 F.2d 47 (1st Cir. 1958) 8

STATUTES

15 U.S.C. § 16 3

15 U.S. C. § 26 3

28 U.S.C. § 1331 2

28 U.S.C. § 1337 3

28 U.S.C. § 1367 3

28 U.S C. § 1391 ..... 3, 6

28 U.S.C. § 1407(a) 6, 7

28 U.S.C. § 1406(b) ..... *passim*

PAGE(S)

RULES

Fed. R. Civ. P. 12(h) 6

Sup. Ct. R. 10(c) 1

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed *per curiam* the decision of the Middle District of Florida without opinion. This affirmance is reported *sub nom. State of Florida v. Liquid Air*, 136 F.3d. 139 (11th Cir. 1998). The unpublished orders of the Middle District of Florida are included in the Appendix to the Petition.

STATEMENT OF JURISDICTION

Certiorari is not appropriate because the Eleventh Circuit's decision does not conflict with an applicable decision of this Court. Sup. Ct. R. 10(c).

STATUTE INVOLVED

The statutory provision involved in this response is 28 U.S.C. § 1406(b), which provides: "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose a timely and sufficient objection to venue."

STATEMENT OF THE CASE

The history of this case shows Petitioners did not interpose a timely and sufficient objection to venue. On the contrary, Petitioners repeatedly consented to venue.

On April 22, 1992, the State of Florida filed a civil antitrust suit against Liquid Carbonic Industries Corporation, The BOC Group, Inc., and Liquid Air Corporation ("Respondents") in the United States District Court for the Middle District of Florida ("District Court" or "Middle District of Florida"). Thereafter, over a dozen "tag-along" actions were filed in the District Court and elsewhere. The

California Plaintiff filed suit in the United States District Court for the Northern District of California and the Mississippi Plaintiffs filed suit in the United States District Court for the Southern District of Mississippi.[1] In 1992, the Judicial Panel on Multidistrict Litigation transferred all tag-along actions to the Middle District of Florida for coordinated pretrial proceedings. (Pet. at 4).

Petitioners filed amended complaints in the Middle District of Florida. On October 20, 1993, the California Plaintiff filed its First Amended Complaint in that district, asserting jurisdiction and venue were proper under 28 U.S.C. § 1331. (R. 737-16). Likewise, on April 1, 1994, the Mississippi Plaintiffs filed their First Amended Complaint in the Middle District of Florida. (R. 965-13).

At a pretrial hearing on January 12, 1994, the District Court set a trial date for September 1995 in Orlando, Florida. (R. 2-312). In May 1995, the District Court rescheduled the trial to February 5, 1996 in Orlando. (R. 3-603-1). The District Court also set a final pretrial schedule including the dates for designating trial witnesses and serving final expert reports. Petitioners' counsel, who were present at the hearing, did not object to venue or suggest the cases should be transferred. (*Id.*).

Throughout the final pretrial stage, Petitioners continued to prepare for a trial in Orlando. (R. 10-918-1; R. 10-919-1; R. 10-920-1; R. 10-921-1). The parties submitted final expert reports in May 1995. In June, the parties exchanged trial witness summaries, including 18 witnesses

---

[1] Counsel for the California Plaintiff had previously filed suit on behalf of Foster Poultry Farms Co. ("Foster Poultry") in the Middle District of Florida. For this reason, Foster Poultry is not a party to the Petition. (Pet. at ii).

affiliated with Petitioners. The final round of pretrial discovery, including depositions of Petitioners' employees, ended in November 1995.

During this time, Plaintiffs never objected to a trial in Orlando. In fact, the Mississippi Plaintiffs opposed The BOC Group, Inc.'s motion for separate trials. (R. 3-640-8). In their brief, the Mississippi Plaintiffs argued that the trial should be "consolidated," that no prejudice would result from a consolidated trial, and that separate trials would not serve the "goals of expeditiousness [and] economy." (*Id.*)

On August 9, 1995, the District Court ordered the parties to prepare a pretrial order by December 7, 1995. (R. 3-641). In the Final Pretrial Order, which all parties signed, Petitioners consented to the District Court's exercise of personal jurisdiction and agreed venue was proper in the Middle District of Florida:

> *This Court has jurisdiction of the matters complained of* under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 16 and 26). It also has jurisdiction under 28 U.S.C. § 1337. The Court has supplemental jurisdiction over Florida's state law claims pursuant to 28 U.S.C. § 1367. *Venue is proper under 28 U.S.C. § 1391.*

(R. 3-740-25) (emphasis added).

On December 11, 1995, the District Court approved the Final Pretrial Order, confirmed the trial date of February 5, 1996 in Orlando and set hearings on pending motions. (R. 4-771). The District Court also set a date for the submission of motions *in limine* and ordered that it would hear those motions in Orlando on February 2, 1996, the

Friday before trial. *Id.* Petitioners' counsel participated in this hearing and did not object to jurisdiction or venue.

By February 1, 1996, Petitioners and the other parties had arrived in Orlando for trial. On February 2, the District Court held a day-long hearing on various trial-related motions. (R. 11-953). Petitioners' counsel participated in this hearing and again did not object to venue. Petitioners also submitted proposed jury instructions and objected to Respondents' proposed jury instructions. (R. 11-944).

In the days before trial, various parties settled. Ultimately, the last group of plaintiffs other than Petitioners resolved its claims on February 5, the morning trial was scheduled to begin. (Pet. Brief at 5). Later that morning, Petitioners and Respondents appeared before the District Court to select a jury and present opening statements. Upon learning they were the only remaining plaintiffs, Petitioners for the first time moved the District Court to transfer the cases to Mississippi and California.[2] (R. 12-991). Their

---

[2] Hoping to free ride on the work of the other opt-out plaintiffs, Petitioners did little to prepare for trial. In response to Petitioners' writ of mandamus, Petitioners' co-plaintiffs documented this strategy:

> In the fall of 1993, shortly after [P]etitioners opted out . . . counsel for [P]etitioners were invited to participate in the discovery efforts that the State of Florida, the class and [certain opt-outs] had undertaken jointly to share costs, but [P]etitioners refused to pay their fair share of the joint costs. [Certain opt-outs] counsel made it clear at that time that [P]etitioners' decision meant that [P]etitioners were not entitled to share the work product of the other plaintiffs . . . . If [certain opt-outs]

motion was denied.[3] (Pet. App. E at 9a; R. 20-6-56). Petitioners then unsuccessfully sought a writ of mandamus in the Eleventh Circuit.

The trial finally began on March 5 and continued until March 21. After deliberating for less than three hours, the jury returned a verdict for Respondents. (R. 15-1062-1-27; R. 15-1063-1). Petitioners then sought appellate review. In their Eleventh Circuit briefs, Petitioners never claimed the District Court lacked jurisdiction or venue. Instead, they argued convenience:

> Plaintiffs do not contend that venue was not proper under Section 1391. The Middle District of Florida was a district in which

---

> ha[d] a "vastly superior position with regard to control of the documents and witnesses" ([Mand.] Br. 20) . . . it was because of their trial preparation. Nothing prevented [P]etitioners from doing their own work. *In re B.C. Rogers, et al.*, No. 96-2179, Dkt. 2/22/96, at 3-4 (emphasis added).

[3] The District Court chided Petitioners after they claimed shock over a trial in Orlando on the date scheduled nine months earlier:

> So that the notion that some calamity has befallen you at my instance, and is sort of irredeemable, almost, is really not born[e] out by the fact that all of this is the result of circumstances that took place in about a two or two and a half hour span, at the most . . . .

(R. 20-32-34; R. 20-33-34).

> these cases could have been brought . . . . [B]ut . . . there are other districts where trial would be more convenient for the parties and witnesses.

(Pet. App. Reply at 13-14).

ARGUMENT

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *LEXECON*

As jury selection was about to begin, Petitioners for the first time moved to transfer their cases to the Southern District of Mississippi and the Northern District of California. Because Petitioners had agreed to a consolidated trial in the Middle District of Florida and waived any objections to jurisdiction or venue, the District Court properly denied this request. 28 U.S.C. § 1406(b); Fed. R. Civ. P. 12(h). In May 1995, the District Court ordered these cases would be tried in Orlando on February 5, 1996. During the intervening nine months, Petitioners never objected to the court's jurisdiction or venue. To the contrary, in the Final Pretrial Order signed by their counsel, Petitioners agreed that (i) the District Court had jurisdiction; and (ii) venue was proper in the Middle District of Florida. (R. 3-740-25).

Lexecon Inc. v. Milberg Wiess Bershad Hynes & Lerach, __ U.S. __, 118 S. Ct. 956 (1998), is substantially distinguishable. *Lexecon* involved the authority of a transferee court to transfer a case to itself for trial under 28 U.S.C. § 1407(a) where a party repeatedly objected to venue. It does not impact a court's power to try a case under 28 U.S.C. § 1406(b) where a party repeatedly consents to venue. Lexecon first moved for a Section 1407(a) transfer during discovery. The district court denied the motion. Lexecon then renewed its Section 1407(a) transfer motion after

discovery had concluded. The court again denied its motion, and Lexecon immediately sought relief in the Ninth Circuit. 118 S. Ct. at 960.

In contrast, Petitioners never sought a transfer before they were scheduled to start trial. Instead, they repeatedly consented to both jurisdiction and venue in the Middle District of Florida. They filed amended complaints in that district. They signed the Pretrial Order, consenting to venue in that district. They submitted jury instructions and filed motions *in limine* for a consolidated trial. And, on the day of trial, they walked into court ready to pick a jury and make opening arguments.

Lexecon does not affect waiver under Section 1406(b). In fact, *Lexecon* teaches "a statute is to be considered in all its parts when construing any one of them" and courts must apply the plain meaning of a statute. 118 S. Ct. at 962. Under the plain meaning of Section 1406(b), any party may waive venue, regardless of Section 1407:

> Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose a timely and sufficient objection to venue.

28 U.S.C. § 1406(b); *see also Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (venue is a privilege which may be waived). Given Petitioners' explicit waiver of any objection to venue, reconsideration by the Eleventh Circuit would be inappropriate.

Petitioners' last-minute objection to venue on the day of opening statements was not timely. *See W.A. Stackpole Motor Transp. v. Malden Spin & Dye Co.*, 263 F.2d 47, 50

(1st Cir. 1958) (objection to venue during trial was not timely under Section 1406(b)). By signing the final Pretrial Order, participating in the final pretrial conference, submitting jury instructions, and appearing in Orlando to conduct *voir dire* and opening statements, Petitioners repeatedly consented to the District Court's jurisdiction and venue. Petitioners' belated objections to jurisdiction and venue ring hollow in light of the history of this case -- and their own actions.[4]

---

[4] Petitioners claim the District Court made a "commitment to defense counsel to resolve all of the cases in Florida." (Pet. Brief at 6). The court, however, unequivocally denied the existence of any such agreement or understanding:

> In fairness to everybody, including the record, there was no effort by anybody for any sort of quid pro quo. There was not any suggestion, or threat, or continuous signal that, if you send these cases back to Mississippi and California, we are not going through with this settlement. There was nothing more or less . . . than a statement that a great deal of expense had been incurred by coming down to Orlando to get ready to deal with this matter, that it was continuing to cause incredible expense, and inconvenience . . . . At no time -- and, indeed, I would have resented it if there had been a time, but at no time was I ever put in a position of being demanded of, or bargained with.

(R. 21-22) (emphasis added).

CONCLUSION

Lexecon does not apply. Petitioners did not "interpose a timely and sufficient objection to venue" as required by 28 U.S.C. § 1406(b). Petitioners expressly consented to venue in the District Court, thereby waiving any such objection. Accordingly, Respondents respectfully request this Court to deny Petitioners' Petition for Writ of *Certiorari*.

Francis J. Higgins
**Counsel of Record*
Michael J. Abernathy
Margaret A. McGreal
BELL, BOYD & LLOYD
Three First National Plaza
Chicago, Illinois 60602
(312) 372-1121

John Burke
Claudia Lovelette
BURKE, WEAVER & PRELL
55 West Monroe Street, Suite 800
Chicago, Illinois 60603
(312) 263-3600

William G. Schopf, Jr.
Patrick J. Heneghan
Arthur J. Howe
SCHOPF & WEISS
304 W. Randolph
Chicago, Illinois 60606
(312) 701-9300

Attorneys for Respondents

Dated: June 1, 1998